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Federal Communications Commission
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Reply Comments of Gerald Roylance on State Preemption

The FCC received several comments and motions on the petitions about preempting stricter state laws when a telephone call crosses state boundaries.

Jurisdiction of the Commission

Several attorneys general argued that the Commission lacked jurisdiction to consider the petitions. In *Bland v. Fessler*[1], a private individual sued the California Public Utilities Commission and the California Attorney General in federal court. Bland sought declaratory relief from state telemarketing laws. The court found that the individual had standing for the suit despite the Attorney General having never enforced the statute[2]. A petition for a declaratory ruling is reasonable as long as the same issue is not before a competent forum.

Federal Objective

Many comments relied on paragraphs 82 through 84 of the *Report and Order*[3]. The Commission stated its belief that Congress had a "federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion"[4]. The Commission's belief is misguided.

If Congress had intended uniform national rules, it could easily have occupied the field. Congress did not occupy the field, so the suggested "federal objective" must be suspect. What Congress actually did was ***find*** that "[o]ver half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices."[5] In this finding, Congress respects the state statutes, but recognizes that states may not be able to enforce its statutes on interstate calls. In the TCPA, Congress retains all more restrictive state statutes.

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[1] *Bland v. Fessler*, 88 F.3d 729 (9th Circuit, 1996)
[2] Id, 737, 739.
[3] *Report and Order*, FCC 03-153 (July 2003).
[4] ¶ 83, footnote 269.
[5] PL 102-243, Finding (7).

Instead of creating a "federal objective" of uniform rules, the Congress was acknowledging the difficulty of long arm enforcement of state laws. Not only must the minimum contact requirements of *International Shoe v. Washington*[6] be present, but also states must have long arm statutes to authorize its courts to accept jurisdiction. In some states, this grant is limited. The TCPA sidestepped state jurisdiction problems by setting minimum national standards and conferring jurisdiction in state or federal court to enforce them. A long arm is not needed to enforce TCPA minimum standards. However, if a state has a long arm, Congress did not prohibit the state from using it to enforce its own statutes.

The "federal objective" of avoiding burdensome compliance costs is also suspect. Although national telemarketers such as Intuit, Visa, Sprint, and MCI would have to obey both national and state requirements, that is not an unreasonable or excessive burden. These companies are seeking millions of customers, so the compliance costs are small compared to the total campaign costs. In addition, preemption would mean interstate callers would have ***lower*** compliance costs than intrastate callers because they could ignore the state requirements that in state callers must still obey.

The "federal objective" of avoiding potential consumer confusion is without merit. The Commission has apparently only viewed the problem from the perspective of the telemarketer. It must also consider the world seen by the consumer. No Comment on this Docket has challenged a state's authority to impose stricter state requirements on telemarketers. The preemption petitioners, despite their claim for uniformity, desire a non-uniform set of telemarketing rules. With preemption, a consumer would have to understand that calls from out-of-state have fewer restrictions than in-state calls. Without preemption, a consumer would see a uniform set: federal augmented by his state's rules. From the consumer's perspective, preemption fosters confusion. The consumer could sue a local company for placing a call, but he could not sue an out-of-state company for a similar call. If the Commission is trading burden and confusion, then the bargain is a little burden on a few interstate telemarketers will save millions of consumers a lot of confusion.

The Commission's "federal objective" is misguided. Interstate telemarketers would like to see uniform national rules because those rules would be the TCPA minimum and frustrate a state's notion of privacy. The federal objective, as stated by Congress, is to balance "individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade" to protect privacy and permit legitimate telemarketing practices[7]. Congress specifically allowed states to exercise their own judgment to further restrict telemarketing practices[8].

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[6] 326 US 310 (1945).
[7] PL 102-243, Finding (9).
[8] 47 USC § 227(e)(1)

Inconsistency and Extraterritoriality

State v Heckel[9] and *Pike*[10] address the Dormant Clause. Below is a quotation from *Heckel* [footnotes omitted] that addresses the relevant issues of the petitions.

> Drawing on two "unsettled and poorly understood" aspects of the dormant Commerce Clause analysis, Heckel contended that the Act (1) created inconsistency among the states and (2) regulated conduct occurring wholly outside of Washington. /14 The inconsistent-regulations test and the extraterritoriality analysis are appropriately regarded as facets of the Pike balancing test. /15 The Act survives both inquiries. At present, 17 other states have passed legislation regulating electronic solicitations. /16 The truthfulness requirements of the Act do not conflict with any of the requirements in the other states' statutes, and it is inconceivable that any state would ever pass a law requiring spammers to use misleading subject lines or transmission paths. Some states' statutes do include additional requirements; for example, some statutes require spammers to provide contact information (for opt-out purposes) or to introduce subject lines with such labels as "ADV" or "ADV-ADLT." But because such statutes "merely create additional, but not irreconcilable, obligations," they "are not considered to be `inconsistent'" for purposes of the dormant Commerce Clause analysis. *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 826 (3d Cir. 1994). The inquiry under the dormant Commerce Clause is not whether the states have enacted different anti-spam statutes but whether those differences create compliance costs that are "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. We do not believe that the differences between the Act and the anti-spam laws of other states impose extraordinary costs on businesses deploying spam. /17
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> Nor does the Act violate the extraterritoriality principle in the dormant Commerce Clause analysis. Here, there is no "sweeping extraterritorial effect" that would outweigh the local benefits of the Act. *Edgar v. MITE Corp.*, 457 U.S. 624, 642, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982). Heckel offers the hypothetical of a Washington resident who downloads and reads the deceptive spam while in Portland or Denver. He contends that the dormant Commerce Clause is offended because the Act would regulate the recipient's conduct while out of state. However, the Act does not burden interstate commerce by regulating when or where recipients may open the proscribed UCE messages. Rather,

[9] *State v. Heckel*, 143 Wash.2d 824 (Washington Supreme Court, 2001)
[10] *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

> the Act addresses the conduct of spammers in targeting Washington consumers. Moreover, the hypothetical mistakenly presumes that the Act must be construed to apply to Washington residents when they are out of state, a construction that creates a jurisdictional question not at issue in this case.

State laws clearly can only impose additional obligations on telemarketers, so they are consistent with federal authority. The questions become what extraordinary costs do state laws impose on telemarketers, and what is the "sweeping extraterritorial effect" of those laws. The costs, learning state laws, are not extraordinary[11]. The extraterritorial effect does not outweigh the clear local benefits of, for example, reduced prerecorded calls and uniform application of state laws.

Petitioners seek to gut state laws by the simple expedient of calling from out of state. Congress found that "residential telephone subscribers consider automated or prerecorded telephone calls, ***regardless of the content or the initiator of the message***, to be a nuisance and an invasion of privacy."[12] [emphasis added] Congress does not limit the statement to just telemarketing calls, nor does it qualify that statement to say that prerecorded political polling is not a nuisance or that nonprofit initiators do not invade privacy. Arguably, the Commission ignored the wishes of Congress when it exempted them and a wide array of other prerecorded calls.[13] Congress also suggested that prerecorded calls to businesses should be restricted,[14] but the Commission did not restrict them. In fact, the Commission made the broadest possible exemptions for making prerecorded calls. Consequently, it should not surprise the Commission that some State Legislatures would impose more restrictions. Given that Congress granted States the power to restrict telemarketing, the FCC should not gut that power by letting a telemarketer call from out of state.

Conclusion

The FCC should deny the petitions. States may impose stricter intrastate requirements on telemarketing. The FCC should clarify that long arm statutes apply and that out-of-state callers must respect intrastate requirements. The laws reflect a legitimate local interest. They affect interstate commerce incidentally. They are not designed to favor local interests at the expense of foreign interests. If there is additional burden on foreign telemarketers, it is slight and a reasonable balance of interests.

The FCC should withdraw its general invitation to examine state telemarketing laws.

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[11] Some of this Docket's Comments provide concise summaries for telemarketers.
[12] PL 102-243, Finding (10).
[13] 47 CFR § 64.1200(a)(2).
[14] PL 102-243, Finding (15).